

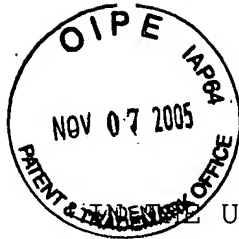


IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Re: Patent Application of	:	Dated:	23 June, 2005
Kintzele, G. et al	:		
Serial No.: 10/670,623	:	Group:	Art Unit 3632
Filed: 25 September, 2003	:		
For: ELASTIC ARTICLE SUSPEN-	:	Examiner:	King, A. M.
SION DEVICE FOR INFANTS	:		
	:	Action:	BRIEF ON
	:		APPEAL

APPELLANTS' BRIEF ON APPEAL
TO THE
BOARD OF APPEALS

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TABLE OF CONTENTS

	<u>Page No.</u>
(1) Real Party in Interest	1
(2) Related Appeals and Interferences	1
(3) Status of Claims	1
(4) Status of Amendments	2
(5) Summary of Claimed Subject Matter	2
(6) Grounds of Rejection to be Reviewed on Appeal	5
A. Claims 1, 2, 5 through 7, 10, 12, 13, 15 and 20	6
B. Claim 14	6
C. Claims 3, 8, 9, 14 and 16	6
(7) Argument	6
A. Claims 1, 2, 5-7, 20, 12, 13, 15 and 20	6
B. Claim 4	12
C. Claims 3, 8, 9, 14 and 16	13

(8)	Claims Appendix	17
(9)	Evidence Appendix	20
(10)	Related Proceedings Appendix	21

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Sir:

(1) REAL PARTY IN INTEREST

The real parties in interest in this appeal are Gregory and Lisen Kintzele, the applicants named above.

(2) RELATED APPEALS AND INTERFERENCES

To the best of Appellants' knowledge, there are no other related appeals, interferences or judicial proceedings known to appellants, the appellants' legal representative or assignee which may be related to, directly effect or be directly effected by or having a bearing on the Board's decision on the pending Appeal.

(3) STATUS OF CLAIMS

Claims 1 through 10 and 12 through 16 and 20 are rejected. Claims 11 and 17-19 have been canceled. Claims 1 through 10 and 12 through 16 and 20 are being appealed.

(4) STATUS OF AMENDMENTS

A Request for Reconsideration was filed on January 24, 2005 subsequent to Final Rejection. An Office Communication was received on February 28, 2005. The Request for Reconsideration was considered but denied.

An amendment is filed contemporaneously with this Appeal Brief canceling claims 17 to 19. This amendment has not yet been considered by the Examiner.

(5) SUMMARY OF CLAIMED SUBJECT MATTER

The claimed subject matter is as follows:

Independent claim 1:

An article suspension device for infants, comprising:

encircling means for surrounding an object - means plus function - (page 5, line 20 and lines 25-26; page 6, lines 1-12 and 18-20; page 8, lines 10-26; Figures 1, 2 and 5: reference numbers 13, 45, 47, Figure 2: 47);

an adjustable elastic loop (page 5, line 21; page 7, lines 2-26, page 8; lines 1-9; page 9, lines 1-11, Figures 1,

3 and 5, reference number 31);

a single length of cord having a first end secured to said elastic loop and a second end secured to said encircling means (page 5, lines 23-24; Figure 1, reference number 19); and

said cord includes a cover extending between said first end and said second end of said cord in outer surrounding relation to said cord, said cover being stretchable a predetermined distance between a retracted position and an extended position in response to stretching of said cord (page 5, lines 22-24; page 6, lines 21-26; page 7, lines 1-3: Figures 1, 2, 3 and 5: reference numbers 18 and 21).

Dependent claim 3:

3. A device according to claim 2 wherein said free end portion is secured to said base portion with a snap fastener (page 6, lines 2-9; page 8, lines 21-26; Figure 2, reference number 15).

Dependent claim 8:

8. A device according to claim 7 wherein said adjusting means further includes a slidable gate normally urged to a closed position by a spring member - means plus function - (page 7, lines 4-22; page 9, lines 4-11; Figures 3, 4A and 4B, reference numbers 23, 33, 37, 38, 41).

Dependent claim 9:

9. A device according to claim 8 wherein a combination of said slidable gate in an open position and said spring form an unobstructed passage through which said length of cord may pass (page 7, lines 4-22; page 9, lines 4-11; Figures 3, 4A and 4B, reference numbers 35, 38, 39, 41, 41, 19).

Claim 12:

An article suspension device for infants, comprising:

an adjustable elongated single elastic cord (page 5, lines 23-24; Figure 1, reference number 19);

having means at a first end for encircling a stationary object - means plus function - (page 5, line 20 and lines 25-26; page 6, lines 1-12 and 18-20; page 8, lines 10-26; Figures 1, 2 and 5: reference numbers 13, 45, 47, Figure 2: 47);

an elastic loop at a second end of said cord (page 5, line 21; page 7, lines 2-26, page 8; lines 1-9; page 9, lines 1-11, Figures 1, 3 and 5, reference number 31);

including a slidable member affixed to one end of said elastic loop (page 7, lines 5-26; page 8, lines 1-9; page 9, lines 1-11; Figures 1, 3, 4A, 4B and 5, reference number 23);

and including means for releasably engaging said cord whereby to adjustably encircle an article inserted in said loop - means plus function - (page 7, lines 6-16; page 8, lines 1-9; page 9, lines 4-11; Figures 1, 3, 4A and 4B, reference number 36, 38, 39, 41, 42);

and a flexible cover member extending between said

first and said second end in outer surrounding relation to said cord, said cover being stretchable a predetermined length between a retracted position and an extended position thereby limiting the extent of stretch of said cord (page 5, lines 22-24; page 6, lines 21-26; page 7, lines 1-3; Figures 1,2, 3 and 5, reference numbers 18 and 21).

Dependent claim 14:

A device according to claim 13 wherein said securing member includes a releasable handle (page 6, lines 2-9; page 8, lines 21-26; Figure 2, reference number 47).

Dependent claim 16:

16. A device according to claim 12 wherein said means for releasably engaging said cord includes a body member - means plus function - (page 7, line 6; Figure 3, reference number 33)

with a single material-receiving opening (page 7, lines 9-22, Figure 4A, reference number 35)

at a first end and a slidable gate (page 7, lines 13-22, Figures 3, 4A and 4B, reference number 38).

(6) GROUND OF REJECTION TO BE REVIEWED ON APPEAL

A. Whether claims 1, 2, 5 through 7, 10, 12, 13, 15 and 20 are unpatentable under 35 U.S.C. §103 over Anderson in view of

Dalmaso.

B. Whether claim 14 is unpatentable under 35 U.S.C. §103 over Anderson combined with Dalmaso and further in view of Gabriel.

C. Whether claims 3, 8, 9, 14 and 16 are unpatentable under 35 U.S.C. §103 over Anderson combined with Dalmaso and further in view of Giacona, III.

(7) ARGUMENT

(A) The rejection of claims 1, 2, 5 through 7, 10, 12, 13, 15 and 20 under 35 U.S.C. §103 as being unpatentable over Anderson (U.S. Patent No. 2,819,923) in view of Dalmaso (U.S. Patent No. 4,253,544).

(i) Claim 12

Referring to claims 1, 2, 5-7, 10, 12, 13, 15 and 20, claim 12 is most representative and recites a device having an adjustable elongated single elastic cord with means at a first end for encircling a stationary object, an adjustable elastic loop at a second end, and a flexible cover member extending between the first and second ends for limiting the extent of stretch of the cord.

(a) Anderson is not analogous art. The Examiner has taken the position that U.S. Patent No. 2,819,923 to Anderson is analogous art rendering appellants' invention obvious in view

of Dalmaso. Anderson describes an animal suspension sling having a flexible steel cable designed to be secured with a slip noose around an object at one end and attached at an opposite end to a carcass with a positioning device. The device is designed to securely suspend a carcass for cleaning or gutting.

Referring specifically to the Examiner's rejection of claim 12, Anderson is not analogous art. A person of ordinary skill in the area of toy or infant tethers would not look to animal slings to solve the problems treated by appellants' invention. Preventing an infant from throwing toys and other articles on the floor and soiling them is a very different "field of endeavor" from securely suspending a carcass from a tree limb so that the carcass may be gutted in a safe manner. Non-analogous art cannot properly be considered under 35 U.S.C. §103. **In re Pagliaro**, 210 USPQ 888, 892 (C.C.P.A. 1981).

(b) There is no motivation or teaching in Anderson to substitute an elastic cord.

Second, the Examiner argues that the animal suspension sling of Anderson, with the exception of the elastic cord, renders appellants' invention obvious. Anderson comprises encircling means for surrounding an object; an adjustable loop; a single length of a non-elastic cord is secured to the loop at one end and to the encircling means at a second end. The Examiner goes on to state that the cord in Anderson is constructed of a flexible material, such as, steel wire cable. "It would have been obvious

to one having ordinary skill in the art at the time the invention was made to have modified the material of the cord in Anderson to have been constructed of an elastic material for the purpose of providing an alternative, flexible, mechanically equivalent material for the cord based on the materials suitability for the intended use and since such a modification would not have produced any unexpected results." Office Communication, 10/22/2004, p. 2-3.

In response, it is submitted that it would not have been obvious under 35 U.S.C. §103 to substitute an elastic cord for a flexible steel cable and is still lacking an important element, namely, the cover. "The mere fact that references can be combined or modified does not render the resultant combination obvious, unless the prior art also suggests the desirability of the combination." *In re Kotzab*, 55 USPQ 2d 1313, 1318 (F. Cir. 2000). Without independent suggestion, the prior art is to be considered merely inviting unguided and speculative experimentation which is not the standard with which obviousness is determined. *Amgen, Inc. v. Chugai Pharmaceutical Co., Ltd.*, 18 USPQ 2d 1016 (Fed. Cir. 1991).

"Flexible" is defined under www.dictionary.com as "capable of bring bent or flexed; pliable". "Elastic" is defined as "easily resuming original shape after being stretched or expanded; springy, rebounding". "Flexible" is very different from "elastic" and there would be a disincentive to substitute. Clearly, Anderson does not suggest or motivate an inventor to substitute an elastic material for the steel cable of Anderson.

In Anderson, the purpose of the suspension sling is to rigidly support game and carcasses above the ground to facilitate cleaning and dressing and prevent other animals from reaching it. Substitution of an elastic cord would create an extremely unstable situation when gutting a carcass. It would also produce a seemingly inoperative device. Tec Air, Inc. v. Denso Mfg. Michigan, Inc., 52 USPQ 2d 1294, 1298 (Fed. Cir. 1999). Accordingly, there is no motivation or teaching to substitute an elastic cord. Further, substitution of an elastic cord in Anderson would destroy the intent, purpose or function of Anderson. The *prima facie* case for obviousness cannot be properly made. In re Gordon, 221 USPQ 1125 (Fed. Cir. 1984).

(c) There is no motivation or teaching to combine Dalmaso with Anderson.

The Examiner also takes the position that it would have been obvious to modify the device in Anderson to include the cover as taught by Dalmaso for the purpose of providing a means for providing shock absorption to the device. To establish a *prima facie* case of obviousness, one must show "some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine [or otherwise modify] the relevant teachings of the reference." In re Fine, 5 USPQ 2d, 1596, 1598 (Fed. Cir. 1988).

U.S. Patent No. 4,253,544 to Dalmaso discloses an energy-absorbing lanyard which has a warning flag attached for

indicating the status of the lanyard. A section of the lanyard includes a load-bearing core 14 and a jacket 18 but the jacket does not limit the extension of the cord. Instead, an indicator flag is affixed to a gathered section of the jacket so that when force is applied to the lanyard, the jacket ruptures and the flag is freed from the jacket..

There is a clear lack of motivation to combine the cover as taught by Dalmaso with the device of Anderson. When dealing with a carcass, the cover would become covered with blood and other foreign matter and would not be practical in any way. One skilled in the art would not look to cover the steel cable of Anderson with a fabric covering. The Examiner states that it would have been obvious to modify the device in Anderson to have included the cover as taught by Dalmaso for the purpose of providing means for shock absorption to the device. The jacket 18 of Dalmaso does not provide shock absorption for the lanyard. The core 14 is made from a synthetic, high tenacity or bulk continuous filament material, preferably nylon, having a predetermined tensile yield strength. The core 14 provides shock absorption. The jacket only acts to allow for the flag to be freed. Further, shock absorption is not necessary in Anderson when using a steel cable. The Examiner concludes that if you substitute a stretchable cord in Anderson, then shock absorption becomes necessary. This is a double departure from Anderson and destroys the intent, purpose or function of the invention disclosed in the reference.

(d) Examiner has used hindsight to create

Appellants' invention.

Finally, the combination and the cooperative relationship between the elastic cord and cover are critical to appellants' invention. The combination of Anderson with Dalmaso does not result in elements cooperating in the same manner as appellants' invention. The Examiner has failed to consider the combination and has impermissibly used "hindsight" by using the appellants' teaching as a blueprint to hunt through the prior art for the claimed elements and combine them as claimed. *In re Zurko*, 42 USPQ 2d 1476 (Fed. Cir. 1977).

(ii) Claim 1

Claim 1 is somewhat broader than claim 12 in that it does not specifically recite an elastic cord but does recite the stretchability of the cord and the cooperative relationship of the outer surrounding cover which stretches in response to stretching of the cord. For the reasons discussed with respect to the cooperative relationship between the cover and cord with respect to claim 12, it is submitted that claim 1 should similarly be allowable.

(iii) Claims 2, 5-7

Claims 2 and 5 through 7 are dependent from claim 1 and are urged to be allowable on the same grounds as presented in allowability of claim 1.

(iv) Claims 13, 25 and 20

Claims 13, 15 and 20 are dependent from claim 12 and are also urged to be allowable on the same grounds as argued with respect to claim 12.

(B) The rejection of claim 4 under 35 U.S.C. §103 as being unpatentable over Anderson combined with Dalmaso and further in view of Gabriel.

(a) There is no motivation or teaching in Anderson combined with Dalmaso to have included Gabriel.

Once again, appellants reiterate the arguments made previously concerning the citation of Anderson and Dalmaso with respect to appellants' invention. There is no motivation or teaching in Anderson to suggest the use of a carabiner in securing the sling of Anderson to a stationary object. The small permanent loop 9 of Anderson is designed to be used as a common "slip noose", creating a tension sling for securely suspending a carcass and there is no teaching or suggestion of the use of a carabiner. The carabiner would necessarily have to be very large to accommodate the circumference of the tree branch and would also be very difficult to install, the permanent loop of Anderson designed to be thrown over a tree branch in forming a slip knot.

Claim 4 is a dependent claim from claim 1 and for the reasons stated above, Anderson in view of Dalmaso do not render

appellants' invention obvious. There is no motivation or teaching in Anderson or Dalmaso to include the carabiner of Gabriel.

The Examiner has taken the position that Anderson combined with Dalmaso discloses the claimed invention except for the limitation of the encircling means being a carabiner. The Examiner cites Gabriel U.S. Patent No. 4,095,316, which is a simple carabiner, stating that "It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the encircling means in Anderson combined with Dalmaso to have included a carabiner as taught by Gabriel for the purpose of providing an alternative means for attaching the device to a stationary object having a different size and shape than that of the rod or bar." Office Communication, 10/22/2004, p. 4.

(C) The rejection of claims 3, 8, 9, 14 and 16 under 35 U.S.C. §103 as being unpatentable over Anderson in view of Dalmaso and further in view of Giacona, III.

(i) Claims 3 and 14

(a) There is no motivation or teaching in Anderson combined with Dalmaso to include Giacona, III.

The Examiner has taken the position that Anderson combined with Dalmaso discloses the claimed invention except for the limitations of the base portion encircling means having a slidable gate. "It would have been obvious to one having ordinary

skill in the art at the time the invention was made to have modified the device in Anderson combined with Dalmaso to have included the snap fastener and adjusting means as taught by Giacoma, III for the purpose of providing alternative, mechanically equivalent, and more efficient means for attaching the base portion and the free end portion of the encircling means together to form a loop and for easily adjusting the size of the elastic loop for accommodating objects having various sizes and shapes." Office Communication, 10/22/2004, p. 4-5.

Appellants again argue the inapplicability of Anderson and Dalmaso to appellants' invention, as set forth earlier. Giacoma, III (U.S. Patent No. 6,029,870) discloses a water bottle holder having a double length of cord which enters the adjusting member for adjustment of the loop. First, there is no motivation or teaching in Anderson to suggest utilization of a snap fastener or releasable handle as taught by Giacoma, III. As set forth in Anderson, "As the full weight of the animal is imposed on the bight of the adjustable loop, the latter will tend to decrease in size, in accordance with the familiar principle of the slip noose." (Column 2, lines 33 through 36.) This is a tension sling and "the security with which the carcass is held increases with the imposition of increased load forces upon the suspension." (Column 1, lines 34 through 36.) The releasable handle or snap fastener taken from Giacoma, III would be contrary to the stated objectives of Anderson.

(ii) Claims 8, 9 and 16

Second, Giacona, III possesses a double length of cord for the adjusting member. Appellants' invention only requires a single length of cord to pass through the adjusting member at one end as shown in Figure 3. The single cord of appellants' invention allows for a continuous loop to be formed from the suspension cord. This is very different from Giacona, III. Further, there is no motivation or teaching to suggest substituting the adjusting member of Giacoma, III. In evaluating patent references, the features disclosed therein must be ascertained as a whole. It is impermissible to ascertain visually what the applicant did and then view the prior art in such a manner as to select from the random features of the art only those which may be modified and then utilized to reconstruct based on appellants' invention. Ex parte Clayton, 205 USPQ 269 (Ct. App. 1979). It is impermissible to use the claimed invention as an instruction manual or template to place together the teachings of the prior art to arrive at the claimed invention. One cannot use hindsight reconstruction. The Examiner is adding elements to the primary reference instead of modifying or substituting elements. The Examiner is clearly using hindsight to create appellants' invention, particularly where the primary reference (Anderson) is lacking all elements of the claimed combination of claims 1 and 12. Further, the adjusting member of Giacona, III is very different from appellants' adjusting member.

For these reasons, claims 3, 8, 9, 14 and 16 are urged to be allowable based on the above arguments.

An oral hearing is not requested.

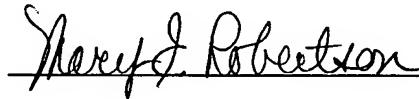
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CERTIFICATE UNDER 37 C.F.R. 1.8

I hereby certify that the foregoing Brief on Appeal is being deposited with the United States Postal Service as first class mail in an envelope addressed to MAIL STOP: APPEAL BRIEF - PATENTS, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 223113-1450, this 23rd day of June, 2005.



See next page for Appendix

(8) CLAIMS APPENDIX

1. An article suspension device for infants, comprising:
encircling means for surrounding an object;
an adjustable elastic loop;
a single length of cord having a first end secured to said elastic loop and a second end secured to said encircling means; and

said cord includes a cover extending between said first end and said second end of said cord in outer surrounding relation to said cord, said cover being stretchable a predetermined distance between a retracted position and an extended position in response to stretching of said cord.

2. A device according to claim 1 wherein said encircling means comprises a free end portion releasably secured to a base portion of said encircling means.

3. A device according to claim 2 wherein said free end portion is secured to said base portion with a snap fastener.

4. A device according to claim 1 wherein said encircling means comprises a carabiner.

5. A device according to claim 1 wherein said elastic loop is formed as a continuation of said cord.

6. A device according to claim 1 wherein said elastic

(10) RELATED PROCEEDINGS APPENDIX

None.

loop includes means for adjusting a length of said loop and said cord.

7. A device according to claim 6 wherein said adjusting means is defined by a body member having a first material-receiving slot and a second material-receiving slot, said first material-receiving slot extending along a parallel axis with said second material receiving slot.

8. A device according to claim 7 wherein said adjusting means further includes a slidable gate normally urged to a closed position by a spring member.

9. A device according to claim 8 wherein a combination of said slidable gate in an open position and said spring form an unobstructed passage through which said length of cord may pass.

10. A device according to claim 1 wherein said cord includes elastic.

12. An article suspension device for infants, comprising:

an adjustable elongated single elastic cord having means at a first end for encircling a stationary object;

an elastic loop at a second end of said cord including a slidable member affixed to one end of said elastic loop and including means for releasably engaging said cord whereby to adjustably encircle an article inserted in said loop;

and

a flexible cover member extending between said first end and said second end in outer surrounding relation to said cord, said cover being stretchable a predetermined length between a retracted position and an extended position thereby limiting the extent of stretch of said cord.

13. A device according to claim 12 wherein said encircling means includes a securing member for detachably securing said cord to a stationary object.

14. A device according to claim 13 wherein said securing member includes a releasable handle.

15. A device according to claim 12 wherein said means for releasably engaging said cord includes a clamping member for securely engaging a length of said cord.

16. A device according to claim 12 wherein said means for releasably engaging said cord includes a body member with a single material-receiving opening at a first end and a slidable gate.

20. A device according to claim 12 wherein said cover member includes a fabric sleeve.

(9) EVIDENCE APPENDIX

Not applicable.